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# ECONOMIC SANCTIONS AND PROTECTION OF FUNDAMENTAL HUMAN RIGHTS: A REVIEW OF THE ICJ'S RULING ON ALLEGED VIOLATIONS OF THE IRAN-U.S. TREATY OF AMITY

Seyed M. H. Razavi & Fateme Zeynodini<sup>†</sup>

*Abstract:* This article studies the unilateral regime of sanctions and their impact on two fundamental human rights: the right to food and the right to health. This article argues that international tribunals will set the level of obligation required to protect these human rights by observing the empirical correlation between economic sanctions and the deterioration of these rights in target states. By reviewing the elements that contribute to the strength of punitive economic measures, this article shows how sanctions have a greater impact on a population. This article concludes that the more powerful the economic sanctions, the higher the level of obligation of the imposing state will be to ensure that the sanctioned state's population's fundamental rights are protected.

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## I. INTRODUCTION

Economic sanctions<sup>1</sup> have become the most relevant instrument of foreign policy designed to respond to a wrongful act or policy of a state,<sup>2</sup> such as aggression,<sup>3</sup> support of terrorism,<sup>4</sup> involvement in internal wars,<sup>5</sup> and

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<sup>1</sup> See generally Thomas W. Walde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response under Political, Legal and Commercial Pressures*, 36 TEXAS INT'L L.J. 184 (2001) ("economic sanctions" generally refer to specific punitive economic actions which goes further than the traditional trade-based models of sanctions and includes any effective restrictive measures).

<sup>2</sup> Jana Ilieva, Aleksandar Dashtevski, & Filip Kokotovic, *Economic Sanctions in International Law*, 9 UTMS J. ECON. 201, 201 (2018).

<sup>3</sup> For example, economic sanction against Germany in 1930s. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 5 (2d ed. 1990).

<sup>4</sup> For example, economic sanction against Libya in late 1980s and early 1990s. *Id.* at 16.

<sup>5</sup> For example, economic sanctions against internal wars in Somalia, Liberia, Angola, Rwanda, Sierra Leone and FR Yugoslavia (Kosovo). *Id.* at 28–32.

the violation of human rights.<sup>6</sup> Sanctions are primarily imposed to change the behavior of the wrongdoer state. However, they have been widely used as an instrument to induce regime change<sup>7</sup> or even as a complement to war.<sup>8</sup>

The increasing global interdependence associated with the flow of goods and services has significantly increased the power of economic sanctions, making them a potentially devastating policy for the target country's people. Economic sanctions, which are often designed to address violations of civil and political rights of the wrongdoer states, instead undermine the economic and social rights of the people living in the target country.<sup>9</sup>

The negative humanitarian impact of economic sanctions has raised questions on the limits to which embargoes should extend in order to punish the wrongful deeds of a target country. This inquiry extends to whether sanctioning states have any responsibility and the duty of care for the effects of their prohibitive regulations and, if so, where the responsibility of sanctioning states lies regarding the humanitarian impact of such restrictive measures.

To address these issues, the Draft Articles on Responsibility of States for Internationally Wrongful Acts,<sup>10</sup> adopted by the International Law Commission ("ILC") in August 2001, developed a legal framework for when a state is held responsible for breaching an international obligation and the adoption of countermeasures between states. Article 50(1)(b) of the Draft Articles on Responsibility of States requires that the adoption of countermeasures by states shall not affect "obligations for the protection of fundamental human rights."<sup>11</sup> The strong language of the Article 50(1)(b) raises a question as to the level of obligation a sanctioning state is subject to

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<sup>6</sup> See PETER WALLENSTEEN, *A CENTURY OF ECONOMIC SANCTIONS: A FIELD REVISITED 2* (2000).

<sup>7</sup> Lenina Pomeranz, *Economic Sanctions as a Political Instrument in International Relations*, 3 *REVISTA TEMPO DO MUNDO* 181, 193 (2017).

<sup>8</sup> David J. Lektzian & Christopher M. Sprecher, *Sanctions, Signals, and Militarized Conflict*, 51 *AM. J. POL. SCI.* 415, 415 (2007).

<sup>9</sup> Amy Howlett, *Getting "Smart": Crafting Economic Sanctions That Respect All Human Rights*, 73 *FORDHAM L. REV.* 1199, 1200 (2004).

<sup>10</sup> See generally Int'l Law Comm'n, Rep. on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

<sup>11</sup> *Id.* at 131.

when ensuring that its economic countermeasures do not affect the protection of fundamental human rights.

Similarly, the ruling of the International Court of Justice (“ICJ”) regarding Iran’s request for the application of provisional measures in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, issued October 3, 2018, was a step forward in establishing a higher level of obligation on the United States for the extraterritorial effects of its unilateral sanctions. The ICJ found that rights asserted by Iran under the 1955 Treaty of Amity, “so far as they relate to the importation and purchase of goods required for humanitarian needs[,]” are plausible and not even the treaty’s national security exception can prohibit Iran’s right to humanitarian goods.<sup>12</sup> The ICJ went a step further, ruling that the mere existence of specific carve-outs for humanitarian trade in the sanctions does not release the United States from its obligations and asked the United States to “ensure payments and other transfers of funds . . . relat[ing] to [humanitarian] goods and services” are not restricted.<sup>13</sup>

This article consists of three main parts. First, it explains the evolution of international law and different approaches in addressing the humanitarian impact of economic sanctions. Second, it analyzes the elements that contribute to the power of a sanction program. In doing so, the article sets out a conceptual framework for a higher level of obligation to protect fundamental human rights in the face of such powerful economic sanctions. Finally, the third part consists of a review and analysis of the ICJ ruling regarding Iran’s request for the indication of provisional measures following the United States’ withdrawal from the Iran nuclear deal, also known as the Joint Comprehensive Plan of Action (“JCPOA”). Through examination of the ICJ’s ruling, this article concludes that there is a higher level of obligation on imposing states to ensure the protection of the fundamental human rights of sanctioned states’ populations.

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<sup>12</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. U.S.)*, Request for the Indication of Provisional Measures, ¶ 70 (July 16, 2018), <https://www.icj-cij.org/files/case-related/175/175-20180716-REQ-01-00-EN.pdf> [hereinafter *Iranian Provisional Measures*].

<sup>13</sup> *Id.* ¶ 98.

## II. ECONOMIC SANCTIONS AND RIGHT TO FOOD AND MEDICINE

Post-Cold War developments in international law and the integration of national economies have contributed to the increased strength and effectiveness of economic sanctions.<sup>14</sup> As such, economic sanctions became a desirable and popular policy tool in the post-Cold War period.<sup>15</sup> The United Nations Security Council (“UNSC”), the body tasked with the adoption of multilateral sanctions under the UN Charter, resorted to these measures thirteen times throughout the 1990s.<sup>16</sup> The United States was the most frequent user of economic sanctions, sanctioning more than thirty-five countries between 1993 and 1996.<sup>17</sup> This evolution transformed economic sanctions from isolated “emergency incidents” in foreign affairs to a common feature in foreign and national security policy.<sup>18</sup>

International trade plays a key role in the realization of both the right to food<sup>19</sup> and health. Cross-border trade provides opportunities “to reduce hunger and poverty in many of the developing countries.”<sup>20</sup> In order to provide access to adequate food and life-saving medicine, it is necessary that these goods transfer from production sites to places of consumption. Exportation of these essential goods from countries producing to countries consuming them is a major element in increasing food and medicine

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<sup>14</sup> William H. Kaempfer & Anton D. Lowenberg, *The Political Economy of Economic Sanctions*, in 2 HANDBOOK OF DEFENSE ECONOMICS 868, 869 (Todd Sandler & Keith Hartley eds., 2007) (“Historically, economic sanctions . . . were used by Napoleon in the Continental System commencing in 1806, by Thomas Jefferson in the Embargo Act of 1807, and by the League of Nations against Italy in 1935 . . .”).

<sup>15</sup> See generally Joy Gordon, *Economic Sanctions, Just War Doctrine, and the “Fearful Spectacle of the Civilian Dead,”* 49 CROSSCURRENTS 387 (1999).

<sup>16</sup> See SELECT COMMITTEE ON ECONOMIC AFFAIRS, THE IMPACT OF ECONOMIC SANCTIONS, 2006–7, HL 96-I, ¶ 17 (UK) (UNSC has “imposed sanctions against Afghanistan, Angola, Cote d’Ivoire, the Democratic Republic of the Congo (DRC), Ethiopia and Eritrea, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, Sudan, the former Yugoslavia, North Korea and Iran”).

<sup>17</sup> William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 INT’L STUD. Q., 37, 37 (1999).

<sup>18</sup> Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT’L SEC. 90, 90 (1997).

<sup>19</sup> See, e.g., Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, E/C.12/1999/5 (1999) [hereinafter *General Comment No. 12*] (the realization of right to food refers to the availability of food, physically and financially, either through feeding oneself from production or international trade—i.e., movement from the production site to the place of consumption).

<sup>20</sup> Food & Agric. Org. of the U.N., *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted Its One Hundred Twenty-Seventh Session, ¶ 7 (2004) [hereinafter *Information and Case Studies*].

security.<sup>21</sup> The dependence of developing and underdeveloped countries on the importation of foodstuffs and medicines has made restrictions on access to international markets and the free movement of goods and services an effective strategy for the sanctioning state to achieve its foreign policy goals with significant negative consequences.<sup>22</sup>

The sanctioning countries have treated the trade of humanitarian goods (food and medicine) differently in their various sanction programs since World War II. This differential treatment is mainly due to differing views of sanctions—some countries regarded them as a full and efficient alternative to military intervention, while others viewed them as a mere instrument of foreign policy, just one part of a forced escalation curve.<sup>23</sup> The most extreme position taken included using punitive measures with regards to the trade of food and medicine and the silence of sanction regulation on permissibility of trade of humanitarian goods.

Punitive measures on humanitarian goods were manifested in forms, such as the sanctioning nation removing food aid<sup>24</sup> and refusing to grant credit for purchasing food and medicine.<sup>25</sup> These forms of sanctions have a devastating impact on countries which depend largely on the flow of humanitarian aid to their territories, or on the grant of credit for their food and medicine industries.<sup>26</sup>

The structure of restrictive measures gradually moved from silence on humanitarian goods toward the inclusion of a specific carve-out for humanitarian goods in the sanction regulations. An explicit exemption was made by the UNSC to exclude medical supplies and foodstuffs when

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<sup>21</sup> See World Food Summit, *Rome Declaration on World Food Security* ¶ 37 (1996) [hereinafter Rome Declaration].

<sup>22</sup> See generally KAMAL MALHOTRA ET AL., *MAKING GLOBAL TRADE WORK FOR PEOPLE* (2003).

<sup>23</sup> Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. 1159, 1169 n.20 (1987) (U.S. President Woodrow Wilson stated: “a nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.”).

<sup>24</sup> See, e.g., HUFBAUER ET AL., *supra* note 3, at 458 (U.S. sanctions against the Nicaraguan Sandinista government included the withdrawal of food assistance).

<sup>25</sup> Howlett, *supra* note 9, at 1218 (for example, the United States’ refusal to grant Poland \$740 million of credit to buy U.S. corn caused domestic food shortages due to the Polish poultry industry’s dependence on U.S. feed corn).

<sup>26</sup> Howlett, *supra* note 9, at 1217.

sanctioning the Federal Republic of Yugoslavia (Serbia and Montenegro).<sup>27</sup> Regarding unilateral state-to-state sanctions, the U.S. embargoes against Nicaragua and Haiti also provided for similar exemptions.<sup>28</sup>

A humanitarian crisis occurred when the UNSC imposed comprehensive sanctions against Iraq. The UNSC resolution provided an explicit exemption for “supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs,”<sup>29</sup> and a subsequent exclusion for foodstuffs from the application of trade prohibitions in another resolution.<sup>30</sup>

However, the comprehensive nature of the economic sanctions against Iraq following the 1991 Persian Gulf War destroyed almost the entirety of Iraq’s infrastructure. It dramatically reduced the importation of food and caused an exhaustion of food stockpiles, which led to the implementation of food rationing in Iraq. The twenty-five-fold increase in prices of non-rationed food and the shortfall in production led to massive malnutrition amongst the population. The destruction of Iraq’s infrastructure had an impact on health care; diseases spread due to contaminated water, severe malnutrition increased, and there was a lack of access to primary health care and life-saving medicines.<sup>31</sup> The imposition of comprehensive economic sanctions has been seen as a form of collective punishment on civilian populations. Some scholars have compared this to blowing up an airplane containing innocent passengers to kill a terrorist,<sup>32</sup> or killing cells indiscriminately to kill a cancer.<sup>33</sup>

### III. RESPONSIBILITY FOR THE HUMANITARIAN IMPACT OF ECONOMIC SANCTIONS

The mere imposition of unilateral economic sanctions, irrespective of the existence of a bilateral or multilateral commitment, would not be in

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<sup>27</sup> S.C. Res. 757, ¶ 4(c) (May 30, 1992).

<sup>28</sup> Richard Garfield, Julia Devin, & Joy Fausey, *The Health Impact of Economic Sanctions*, 72 BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE 454, 458–62 (1995).

<sup>29</sup> S.C. Res. 661, ¶ 3(c) (Aug. 6, 1990).

<sup>30</sup> S.C. Res. 687, ¶ 20 (Apr. 3, 1991).

<sup>31</sup> Garfield, Devin, & Fausey, *supra* note 28, at 464–65.

<sup>32</sup> Howlett, *supra* note 9, at 1217.

<sup>33</sup> *Id.*

breach of an obligation under general international law.<sup>34</sup> According to the ICJ, “[a] state is not bound to continue particular trade relations longer than it sees fit to do so.”<sup>35</sup> In this context, the traditional Westphalian approach to international public law considers the wrongdoer state responsible for a violation of international law. As such, the consequences of such a violation impact its own population.

However, with the development of human rights and international treaties, the humanitarian impact of economic sanctions has come under scrutiny. From a human rights perspective, the ideal situation is that states avoid imposing any unilateral measure which “*impedes the full achievement of economic and social development by the populations of the affected countries.*”<sup>36</sup> The humanitarian analysis of economic sanctions has raised the question as to whether a sanctioning state has any responsibility and duty of care for the indirect effects of its prohibitive regulations.<sup>37</sup>

The early efforts of international legal scholars and writers have focused on drawing analogies with laws applicable to war conditions.<sup>38</sup> They believed that the effects of economic blockades imposed on a population was comparable to wartime blockades under the law of armed conflicts. This led some writers to look for similarities between some principles of international humanitarian law applicable to armed conflict situations—such as the prohibition on starvation of civilians or the free passage of essential food and medicine—to the economic sanctions situation.<sup>39</sup> While the commentators generally reject the argument that sought to include non-military interventions (e.g., unilateral economic sanctions) within the scope

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<sup>34</sup> See Antonios Tzanakopoulos, *State Responsibility For “Targeted Sanctions,”* 113 AM. J. INT’L L. UNBOUND, 135, 138 (2019).

<sup>35</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 276 (June 27).

<sup>36</sup> *Information and Case Studies*, *supra* note 20, ¶ 3 (emphasis added). See also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO CONSORTIUM (Jan. 2013), [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) [hereinafter Maastricht Principles].

<sup>37</sup> Idriss Jazairy, *Unilateral Economic Sanctions, International Law, and Human Rights*, 33 CARNEGIE COUNCIL FOR ETHICS IN INT’L AFFS. 291, 291 (2019).

<sup>38</sup> See, e.g., Garfield, Devin, & Fausey, *supra* note 28.

<sup>39</sup> Hans-Peter Gasser, *Collective Economic Sanctions and International Humanitarian Law—An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAORV] 871, 901 (1996).



of the UN Charter Article 2(4) prohibiting the use of force,<sup>40</sup> international human rights laws and literature are, to some extent, sensitive to discussions regarding the similarities between the effects of economic sanctions and war on civilian populations. When discussing the obligations unaffected by countermeasures, the UN International Law Commission refers to the Additional Protocol to the Geneva Conventions relating to the protection of victims of international armed conflicts to draw an analogy with the prohibition, contained therein, of using the “starvation of civilians as a method of warfare.”<sup>41</sup> The Human Rights Council’s Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights concludes in its report in 2018 that “the combination of comprehensive unilateral coercive measures and the imposition of secondary sanctions on third parties unrelated to the dispute are tantamount to a peacetime blockade.”<sup>42</sup>

A major step toward human rights limitations on economic sanctions was at the urging of the UN Commission on Economic, Social and Cultural Rights (“CESR”) to states to refrain from enacting food embargoes and measures that directly restrict or endanger the production and supply of food<sup>43</sup> and adequate medicine and medical equipment.<sup>44</sup> The CESCR’s provision made states imposing sanctions responsible for the direct consequences of their food and medicine embargoes, a weapon which some claim is still used in modern warfare.<sup>45</sup> While the CESCR believes that the imposition of economic sanctions does not nullify and diminish the obligation of the sanctioned state to protect the human rights of its citizens,<sup>46</sup>

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<sup>40</sup> J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180 (1986).

<sup>41</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, art. 54, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3; Int’l L. Comm’n Rep., *supra* note 10.

<sup>42</sup> U.N. Human Rights Council, Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, ¶ 34, A/HRC/39/54 (2018).

<sup>43</sup> *General Comment No. 12*, *supra* note 19, ¶ 37.

<sup>44</sup> U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 41, E/C.12/2000/4 (2000) [hereinafter *General Comment No. 14*].

<sup>45</sup> JOANNA MACRAE & ANTHONY B. ZWIWI, *Food as an Instrument of War in Contemporary African Famines: A Review of the Evidence*, in 16 DISASTERS 299, 299 (1992). See e.g., Garfield, Devin, & Fausey, *supra* note 28, at 454.

<sup>46</sup> U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 8 on the Work of Its Seventeenth Session*, E/C.12/1997/8, at ¶ 10 (1997) [hereinafter *General Comment No. 8*] (“While sanctions

it calls on the sanctioning state to distinguish between the basic objectives of its sanctions and “the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”<sup>47</sup>

A major step in developing the role of human rights in the adoption and implementation of economic countermeasures and sanctions was the creation of the Draft Articles on Responsibility of States,<sup>48</sup> which aimed at codifying and developing customary international law on state responsibility, means of reparation<sup>49</sup> and the adoption of countermeasures as an instrument of response by the injured state. Article 50(1)(b) provides that regardless of how grave a state’s wrongful act may be and no matter how critical its failure to respect international obligations any countermeasure introduced shall not affect the “*obligations for protection of fundamental human rights*.”<sup>50</sup> This obligation is addressed to either the sanctioning state<sup>51</sup> or the sanctioned state<sup>52</sup> and imposes certain limits on economic sanctions.<sup>53</sup> Article 50(1)(b)’s strong language<sup>54</sup> develops a legal framework for the sanctioning state, where the adoption of countermeasures cannot impinge on the “protection of fundamental human rights.” The question, then, will be whether the sanctioning state’s obligation with regards to its sanction measures is only a negative obligation to refrain from imposing de jure prohibitions on the trade of humanitarian goods or whether this obligation goes further, such that a state could be held liable for the extraterritorial effects of its unilateral measures.

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will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.”)

<sup>47</sup> *Id.* ¶ 4.

<sup>48</sup> *See* Int’l Law Comm’n Rep., *supra* note 10, at 132 cmt. 6–7.

<sup>49</sup> *Id.* at 129–37 (means of reparation include restitution, compensation, and satisfaction).

<sup>50</sup> *Id.* at 131.

<sup>51</sup> *See* Silvia Borelli & Simon Olleson, *Obligations Relating to Human Rights and Humanitarian Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1187–88 (James Crawford et al. eds., 2010).

<sup>52</sup> HANS MORTEN HAUGEN, *THE RIGHT TO FOOD AND THE TRIPS AGREEMENT: WITH A PARTICULAR EMPHASIS ON DEVELOPING COUNTRIES’ MEASURES FOR FOOD PRODUCTION AND DISTRIBUTION* 365 (2007).

<sup>53</sup> *See* Int’l Law Comm’n Rep., *supra* note 10, at 131.

<sup>54</sup> *Id.*

## IV. PROTECTION OF THE FUNDAMENTAL RIGHT TO FOOD AND HEALTH

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) defines the right to adequate food as a “right of everyone to an adequate standard of living.”<sup>55</sup> This definition refers to physical<sup>56</sup> and economic<sup>57</sup> access to adequate food.<sup>58</sup> Similarly, the ICESCR calls on state parties to recognize the universal right to physical and mental health,<sup>59</sup> which closely relates to the right to life.<sup>60</sup> This requires that facilities and goods be available, accessible, acceptable and be of good quality.<sup>61</sup>

Despite the general definition of these two rights, the ICESCR put forward a minimalistic understanding of the core content of these rights. The states’ obligation to comply with the core content of these rights is an immediate rather than progressive obligation.<sup>62</sup> Accordingly, the ICESCR recognizes the fundamental aspect and core obligation of the right to food by “recognizing the fundamental right of everyone to be free from hunger.”<sup>63</sup> Equally, access to life-saving medicines is viewed as a core content, with a minimum level of right to health.<sup>64</sup> The CESCR calls on states to “refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment.”<sup>65</sup>

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<sup>55</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 11 ¶ 1 (Jan. 3, 1976).

<sup>56</sup> *General Comment No. 12*, *supra* note 19, ¶ 8 (“availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals”).

<sup>57</sup> *Id.* ¶ 13 (“Financial costs associated with the acquisition of food for an adequate diet” which do not threaten “the attainment and satisfaction of other basic needs . . .”).

<sup>58</sup> Rome Declaration, *supra* note 21, ¶ 13.

<sup>59</sup> G.A. Res. 2200A (XXI), *supra* note 55, art. 12; *see* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948); *see also* G.A. Res. 44/25, Convention on the Rights of the Child, at art. 24 (Nov. 20, 1989).

<sup>60</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 (Dec. 16, 1966) (relating to right to life through increase and/or decrease in infant mortality and life expectancy); *see also* U.N. Human Rights Comm., *General Comment No. 6: Article 6 (Right to Life)*, ¶ 5 (Apr. 30, 1982) [hereinafter *General Comment No. 6*].

<sup>61</sup> *General Comment No. 14*, *supra* note 44, ¶ 12(d) (“As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.”).

<sup>62</sup> *General Comment No. 12*, *supra* note 19, ¶ 1 (For right to food: CESAR links the identification of the medicines to the WHO Model List of Essential Drugs (G.C. 14, ¶ 12(a)).

<sup>63</sup> *General Comment No. 6*, *supra* note 60, art. 11(2).

<sup>64</sup> *General Comment No. 14*, *supra* note 44, ¶ 43(d).

<sup>65</sup> *General Comment No. 14*, *supra* note 44, ¶ 41.

In addition, the Maastricht Principles on Extraterritorial Obligation on Social and Economic Rights insist on humanitarian goods and require states to fully respect human rights obligations in the “the design, implementation and termination of any sanctions regime,” and to refrain from embargoes on “goods and services essential to meet core obligations.”<sup>66</sup>

Recent sanctions programs generally include food and medicine-related carve-outs to comply with states’ obligations contained in the human rights treaties and the Draft Articles on Responsibility of States. Although these humanitarian exemptions have become a universal clause, controversy nevertheless exists regarding the effectiveness of these textual exemptions and carve-outs in protecting the fundamental rights of the target population.<sup>67</sup>

The CESCR sets a clear distinction between three levels of human rights obligations with which states must comply. These are known as “the obligations to respect, to protect and to fulfill.”<sup>68</sup> The obligation to respect is a negative obligation on states to ensure that they do not adopt measures or take actions which violate human rights. The obligation to protect lies between the obligation to respect and obligation to fulfill. It goes beyond a mere negative obligation of the state by calling upon the states to ensure that the human rights in question are not significantly affected by measures taken.<sup>69</sup> Finally, the obligation to fulfill requires the state to proactively take actions that improve living conditions, like individuals’ access to food and medicine (obligation to facilitate). If the state is unsuccessful in this, they

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<sup>66</sup> Maastricht Principles, *supra* note 36, ¶ 22.

<sup>67</sup> Some sanction programs also view humanitarian exemptions from a business perspective. For example in Canada’s Special Economic Measures Act (“SEMA”) 2010 against Iran, Canada expressed its business expectation such that despite “areas of trade that are expressly permitted under the Regulations—such as trade in wheat, pulses and vaccines, of which Canada is historically a large supplier—which fall under the exemption for the provision of food and medicines” these areas will be affected by sanctions “if Iran decides to retaliate for the additional measures imposed by choosing alternative suppliers for these goods.” Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.).

<sup>68</sup> *General Comment No. 12*, *supra* note 19, ¶ 15.

<sup>69</sup> *General Comment No. 14*, *supra* note 44, ¶ 35 (“Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.”).

must provide assistance and aid directly to the individuals (obligation to provide).<sup>70</sup>

There is a serious doubt concerning whether providing a textual carve-out for humanitarian goods in a sanction programs releases the sanctioning state from its obligation to protect fundamental human rights. The obligation to protect requires that a state refrains from taking actions that directly affects fundamental human rights. However, the obligation goes further than this simple textual carve-out by obligating a state to ensure that impediments and obstacles to trade of humanitarian goods are effectively removed. The question is therefore how to interpret the scope of a sanctioning state's obligation to remove impediments to the provision of human rights-related goods from its sanction regulation, in light of the state's liability for the extraterritorial effects of its domestic measures.

#### A. *Impact on the Target Population*

Generally, a state can be held liable for actions occurring outside its territory and jurisdiction only under exceptional circumstances such as situations when a state exercises control over a territory or when a state exercises authority and control over an individual.<sup>71</sup>

The impact of a domestic action outside of the jurisdiction of a state can also trigger liability issues for the acting state. If a state's domestic action leads to a violation of human rights outside of its jurisdiction, a state can be held liable.<sup>72</sup> Sanction programs are not static, and their impact is not necessarily limited to the territory of the sanctioning state. Sanctioning states often resort to a variety of components to maximize the effectiveness of sanctions. This increases the pressure on the target state. As such, each sanction program might have a different humanitarian impact on the target population. These components consist in the nature of the sanction measures, the reach of these measures, the number of states adopting the

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<sup>70</sup> *Id.* ¶ 23.

<sup>71</sup> *Al Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 58–59, ¶¶ 133–38. (2011);. For further information, see generally Jane M. Rooney, *The Relationship Between Jurisdiction and Attribution After Jaloud v. Netherlands*, 62 NETH. INT'L L. REV. 407–28 (2015).

<sup>72</sup> Mehmet Şükrü Güzel, *Venezuela Sanctions and the Concept of Extraterritorial Humanitarian Responsibility*, 11 ZFWT 169, 184 (2019).

sanction measures and the dominant and exclusive control of the sanctioning state on the target's transactional supply chain and economy.

### 1. *Comprehensiveness*

A major motivating factor for a sanctioning state increasing the power and impact of sanction programs relates to the scope of sanctions. The decision to increase the scope of sanctions and to extend the areas of prohibition to different sectors of the sanctioned state's economy not directly related to the state's wrongful act increases pressure on the civilian population in the sanctioned state.

The catastrophic humanitarian consequences of the broad and comprehensive embargoes imposed by the UNSC in the 1990s on Iraq<sup>73</sup> led to a major shift in the UNSC policy toward using economic sanctions. This shift forced the United Nations to step back from the traditional policy of designing comprehensive sanctions and adopt a smarter approach. Instead of sanctioning the target state's whole economy, the UNSC has moved to sanctioning certain sectors and individuals directly related to the target state's wrongful act.<sup>74</sup> However, while comprehensive sanctions are no longer considered a multilateral solution to threats to peace and security, they are still used in the state-to-state unilateral context.<sup>75</sup> The underlying reason for using comprehensive sanctions is that it pushes the ruling elites of the affected population to seek a change in the policies of their state to end the suffering of the sanctioned population.<sup>76</sup>

Comprehensive sanctions have regressive effects on the right to health and food since the burden falls on the most vulnerable parts of the population.<sup>77</sup> The decision-makers in the sanctioned state, who should really be the targets of these sanctions, may find the latter desirable and

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<sup>73</sup> Jazairy, *Unilateral Economic Sanctions*, *supra* note 37, at 294.

<sup>74</sup> Peter Van Elsuwege, *The Adoption of "Targeted Sanctions" and the Potential for Inter-Institutional Litigation After Lisbon*, 7 J. CONTEMP. EUR. RES. 488, 488 (2011).

<sup>75</sup> WALLENSTEEN, *supra* note 6, at 22–23.

<sup>76</sup> Howlett, *supra* note 9, at 1212.

<sup>77</sup> Idriss Jazairy (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights), Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, UN Doc. A/HRC/30/45, ¶ 16 (Aug. 10, 2015) (3010, 20185).

advantageous on a personal level.<sup>78</sup> Comprehensive sanctions harm the sanctioned state's economy in a significant manner by crippling sensitive income-generating sectors of the economy, especially in mono-product countries.<sup>79</sup> Far-reaching comprehensive sanctions, in addition to negative macroeconomic consequences, usually lead to a chilling effect discouraging foreign business entities from engaging in authorized transactions, to avoid any unintentional violation of sanction measures.<sup>80</sup> In addition, sanctions increase transaction costs by making public goods unavailable in the sanctioned state, causing a catastrophic situation in both economic and social terms.

According to the CESC, comprehensive sanctions cause "significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work."<sup>81</sup> Considering the above elements, the more comprehensive the sanction program is, the more powerful the impact of the restrictive measures and the more likely it is that they harm average citizens.<sup>82</sup>

## 2. *Extraterritoriality*

The other element strengthening the impact of sanction programs is the extraterritorial application of domestic sanction measures. The element of extraterritoriality in sanction programs, often known as secondary sanctions, aims at universalizing the restrictive measures by closing other

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<sup>78</sup> *General Comment No. 8, supra* note 46, ¶ 3 ("In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing elites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition.").

<sup>79</sup> See David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 12 (David Cortright & George A. Lopez eds., 2002) (Oil Embargo in comprehensive way in Iraq oil embargo in targeted way against Cambodia, Sierra Leone and Angola for the territories controlled by rebelled and armed groups).

<sup>80</sup> INTERNATIONAL CRISIS GROUP Middle East Report No. 138, *Spider Web: The Making and Unmaking of Iran Sanctions*, INT'L CRISIS GRP. (Feb. 25, 2013), <https://d2071andvip0wj.cloudfront.net/138-spider-web-the-making-and-unmaking-of-iran-sanctions.pdf> [<https://perma.cc/QV6R-98VB>] [hereinafter INT'L CRISIS GROUP REPORT].

<sup>81</sup> *General Comment No. 8, supra* note 46, ¶ 3.

<sup>82</sup> INT'L CRISIS GROUP REPORT, *supra* note 80, at ii.

trade alternatives for the target state, thereby increasing the reach of the sanctions.

An extraterritorial sanction program sets certain restrictions on individuals and entities outside of the jurisdiction of the sanctioning state, who generally conduct business with the target state.<sup>83</sup> Such programs assert that accessing the sanctioning state's market should be penalized and punished as a breach of the domestic sanction provisions. This "jurisdiction by territorial extension of domestic law"<sup>84</sup> has been highly controversial in international relations.<sup>85</sup> It ignores the conventional understanding of jurisdiction toward other states causing the opposing states to react to these measures by enacting blocking statutes.<sup>86</sup>

On the other side, the extraterritorial sanctions have been questioned as being unlawful with regards to its human rights impact toward target state.<sup>87</sup> By generalizing the restriction to all commercial partners around the globe, extraterritorial sanctions remove any alternative ways for the sanctioned state to continue its foreign trade and reduces the bargaining power of the sanctioned state in doing trade, even trade of humanitarian goods.<sup>88</sup>

### 3. *Multilateralization*

One element that increases the power of sanction measures is the number of states adopting the same restrictive measure against the target country. Creating an effective coalition for the implementation of restrictive measures makes sanctions more likely to succeed and affects the financial and trading capacity of the target country. Sanctioning states have sought to design measures and actions ensuring "that sanctions measures are applied

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<sup>83</sup> Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 906 (2009).

<sup>84</sup> CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 94 (2nd ed. 2015); Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 87–90 (2014).

<sup>85</sup> Jazairy, *Unilateral Economic Sanctions*, *supra* note 37, at 296.

<sup>86</sup> Council Regulation 2271/96, 19196 O.J. (L 309) 1 (EC) (for example, the EU Blocking Statute is to protect EU operators from the extra-territorial application of third country laws).

<sup>87</sup> Jazairy, *Unilateral Economic Sanctions*, *supra* note 37, at 296.

<sup>88</sup> Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 626 (2008).



multilaterally whenever possible.”<sup>89</sup> However, this requires a continuous effort from sanctioning states to expand the reach of the restrictive measures by maintaining an alliance with all participants despite different objectives. Therefore, working with like-minded countries to grow the list of sanctioning states, with the aim of maximizing the impact of the sanction provisions, has been at the cornerstone of sanctioning states’ foreign policy.

The comparison between the economic sanctions imposed against Iran in the 2010–2013 period, and the U.S. withdrawal from the JCPOA and re-imposition of secondary sanctions against Iran in May 2018, illustrates the importance of the multilateralization element to increase the power and impact of sanction programs. Multilateralism in sanction programs is generally ensured through the initiation or backing of the program by the UNSC. In July 2010, the European Union and the United States enacted two sanction regulations that set considerable prohibitions on Iran’s energy and financial sectors.<sup>90</sup> These restrictions, introduced after the imposition of UNSC Resolution 1929 against Iran, had a significant impact on Iran’s economy and its foreign trade sector due to the adoption of similar prohibitive measures by Iran’s major trading partners, such as Switzerland, Canada, Australia, South Korea and Japan.<sup>91</sup> The restrictions significantly impacted Iran’s economy.

The multilateralization effort, even in the absence of a UNSC specific ruling on the prohibitive measure, can have a serious impact on the sanctioned state. The EU Council Decision dated January 23, 2012,<sup>92</sup> which banned the purchase of Iranian crude oil, was adopted following discussions among high-level political decision-makers in Europe. It was the outcome of a multilateral effort initiated by the United States, which had enacted the National Defense Authorization Act for Fiscal Year 2012 (“NDAA 2012”).<sup>93</sup> This set of sanction provisions, though going significantly further than the

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<sup>89</sup> *Canadian Sanctions Frequently Asked Questions*, GOV’T OF CANADA, [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/faq.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/faq.aspx?lang=eng) (last visited Feb. 4, 2020).

<sup>90</sup> Council Decision 2010/413/CFSP of 26 July 2010 O.J. (L 195) 39 (EC).

<sup>91</sup> Farshad Shamgholi, *Sanctions Against Iran and Their Effects on the Global Shipping Industry* (Spring 2012) (unpublished Master’s Thesis, Lund University), (<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=2520391&fileOID=3046709>).

<sup>92</sup> Council Decision 2012/35/CFSP of 23 Jan. 2012 O.J. (L 19) 22 (EC).

<sup>93</sup> Nat’l. Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (2012).

legal prohibitions provided under the UNSC resolutions against Iran,<sup>94</sup> was orchestrated by a coalition of like-minded countries with a multilaterally agreed target.<sup>95</sup>

#### 4. *Monopoly Situation*

A business transaction requires availability of certain logistical elements—such as banking relations, insurance, and means of transportation—without which a transaction could not be completed. Unlike extraterritorial sanctions, which directly address elements outside of the jurisdiction of the sanctioning state, holding a monopoly over one of the constituent elements of a business transaction enables the sanctioning state to give extraterritorial effect to its domestic measure, vis-à-vis individuals and entities outside of its territory.

The U.S. banking system is a perfect example of such a monopoly. Its monopoly over banking payments, insurance, and transportation means U.S. domestic sanctions indirectly prevent individuals and entities, who are subject to a different jurisdiction, from providing domestically-prohibited services to the sanctioned state.<sup>96</sup> In such a context, the United States enjoys a monopoly over one of the key components of the trading chain, thus impeding the formation of the business transactions, which should have been outside the scope of the U.S. jurisdiction, and making economic sanctions one of the utmost effective tools for dictating a desired foreign policy.

##### *a. The International Financial System: the U.S. Example*

The most important chain in a transaction, the monopoly for which is currently held by the United States, is the banking system. The banking system facilitates the transfer of the value of a transaction from one party to another. In the absence of such a crucial component, the transaction will not be completed. U.S. leverage over the international banking system comes

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<sup>94</sup> S.C. Res. 1737, ¶ 3-19 (Dec. 27, 2006); S.C. Res. 1747, ¶ 5-8 (Mar. 24, 2007); S.C. Res. 1803, ¶ 3-13 (Mar. 3, 2008); S.C. Res. 1929, ¶ 7-31 (June 9, 2010) (the UNSC Resolutions imposing economic restrictive measure against Iran were UNSC Resolutions 1737, 1747, 1803, and 1929).

<sup>95</sup> Scott, *supra* note 84, at 120.

<sup>96</sup> Robert J. Graves & Indranil Ganguli, *Extraterritorial Application of the USA PATRIOT Act and Related Regimes: Issues for European Banks Operating in the United States*, 3 PRIVACY & DATA SECURITY L.J. 967, 983 (2007).

from the dominance of the U.S. currency, which started as the reserve currency for most countries following the internationalization process of the U.S. Dollar.<sup>97</sup> It also acts as the trade settlement currency due to the fact that it acts as a benchmark for commodity prices, such as oil, in global markets.<sup>98</sup> This makes the U.S. Dollar the usual currency for international transactions, foreign exchange reserves of central banks around the world and forex trading.<sup>99</sup> The United States has used its banking leverage and the international financial mechanism as a powerful tool for limiting access to financial institutions breaching U.S. secondary sanctions through their conduct of “significant financial transactions”<sup>100</sup> on behalf of sanctioned nationals and individuals, to the international banking system.<sup>101</sup> The intertwining of the United States and global financial systems<sup>102</sup> allows for the possibility of prohibiting certain entities and their banks from opening correspondent or payable-through accounts in the United States. Further actions, like restricting access to financial messaging services such as SWIFT,<sup>103</sup> act as powerful instruments in the hands of the United States to punish foreign financial institutions that fail to comply with U.S. sanctions. Such actions, which take place either through judicial indictment, U.S. Treasury designation, or fines addressed to the major banks for their past actions facilitating transactions for a sanctioned state,<sup>104</sup> can cause the

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<sup>97</sup> Ramaa Vasudevan, *Finance, Imperialism, and the Hegemony of the Dollar*, MONTHLY REV., APR. 1, 2008, at 3.

<sup>98</sup> Carla Norrlof, *Dollar Hegemony: A Power Analysis*, 21 REV. INT’L POL. ECON. 1042, 1058 (2014).

<sup>99</sup> Kimberly Amadeo, *Why the US Dollar Is the Global Currency*, The Balance, <https://www.thebalance.com/world-currency-3305931> (last updated Dec. 13, 2019).

<sup>100</sup> Exec. Order No. 13,622, 70 C.F.R. 45897, Section 1 (July 30, 2012) (according to U.S. President Executive Order 13,622, foreign financial institutions that knowingly facilitate significant transactions or provide significant financial services for sanctioned entities or individuals are exposed to potential loss of access to the U.S. financial system).

<sup>101</sup> See <https://www.treasury.gov/press-center/press-releases/Pages/tg1661.aspx> (announcing the imposition of sanctions under the CISADA, against Bank of Kunlun in China and Elaf Islamic Bank in Iraq for knowingly facilitating significant transactions or providing significant financial services for designated Iranian banks).

<sup>102</sup> Thomas Costigan, *The US Dollar as the Global Reserve Currency: Implications for US Hegemony*, 8 WORLD REV. OF POL. ECON. 104, 104–22 (2017).

<sup>103</sup> *The Society for Worldwide Interbank Financial Telecommunication (SWIFT)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Society\\_for\\_Worldwide\\_Interbank\\_Financial\\_Telecommunication](https://en.wikipedia.org/wiki/Society_for_Worldwide_Interbank_Financial_Telecommunication) (last visited Feb. 23, 2020).

<sup>104</sup> For example, Barclays was fined \$298 Million in August 2010, Credit Suisse was fined \$536 Million in December 2010, Lloyds Banking \$350 Million in January 2009, UBS was fined \$100 Million, ABN Amro Bank NV \$80 Million in December 2005, JP Morgan Chase \$88.3 Million in August 2011, HSBC \$1 Billion in May 2011, Standard Chartered \$327 Million in December 2012, and Bank of Tokyo

depletion of a bank's deposits and even the permanent closure of the bank.<sup>105</sup> This forces the sanctioned state to make a considerable shift in its trade policy, at least on the short term.<sup>106</sup>

Besides financial institutions, such restrictive measures can also target a banking jurisdiction in its entirety by sanctioning the use of the sanctioned state's currency by other financial institutions.<sup>107</sup> Designating the sanctioned state's banking sector as an area at risk for money laundering is a further action that can be taken by sanctioning states. For example, the U.S. President's decision in November 2011 designated Iran as an area of "primary money laundering concern"<sup>108</sup> and authorized the United States to take special measures against foreign banks establishing corresponding relations with Iranian financial institutions. Such a domestic measure has had a significant impact on Iran's banking sector, to the extent that even when U.S. secondary sanctions against Iran were lifted following the implementation of the Iran nuclear deal, Iran's banking relations nevertheless failed to normalize with non-Iranian financial institutions.

By using its dominant position in global financial markets, the United States' actions went further than sanctioning international financial institutions and have been used as a powerful instrument to persuade international companies to walk away from doing business with the

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Mitsubishi UFJ was fined \$250 Million in June 2013. See Oriana Roncarolo, *Arms and Dual-Use Goods Export Controls*, DELOITTE (Nov. 23, 2017), [https://www2.deloitte.com/content/dam/Deloitte/it/Documents/finance/dualusegoods/Opening%20Address\\_O.%20Roncarolo.pdf](https://www2.deloitte.com/content/dam/Deloitte/it/Documents/finance/dualusegoods/Opening%20Address_O.%20Roncarolo.pdf).

<sup>105</sup> Nate Raymond & Lynnley Browning, *Swiss Bank Wegelin to Close After Guilty Plea*, REUTERS (Apr. 3, 2013, 7:11 PM), <https://www.reuters.com/article/us-swissbank-wegelin-idUSBRE9020020130104> (explaining that U.S. indictment against the Switzerland's oldest bank, Bank Wegelin & Co., caused the bank to close permanently).

<sup>106</sup> See Carrie Lyn Donigan Guymon, *The Best Tool for the Job: The US Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L 849, 877 (2009) (providing the example that the U.S. Treasury's designation of Banco Delta Asia SARL as a "primary money laundering concern" on September 2005, led to depletion of 34% of deposits from this bank and acted as a major element in causing North Korea to seriously re-engage in the Six Party Talks).

<sup>107</sup> Exec. Order 13,645, 78 C.F.R. 33945 (June 3, 2013) (for example, US sanctions against the Iranian currency (the Rial) under U.S. President Executive Order 13,645, June 3, 2013).

<sup>108</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (under section 311 of the U.S. Patriot Act authorizing the United States to adopt special measures against a jurisdiction as a whole, an institution, a class of transactions or a type of account).

sanctioned state.<sup>109</sup> In one of the most prominent cases, the French multinational oil company, Total, announced that following the U.S. withdrawal from the Iran nuclear deal and the reinstatement of U.S. secondary sanctions, it was not in a position to continue operating the mega-project, South Pars 11, in Iran due to several U.S.-created risks,<sup>110</sup> including the risk of “loss of financing in dollars by U.S. banks for [its] worldwide operations.” Indeed, U.S. banks were involved in more than ninety percent of Total’s financing operations.<sup>111</sup>

The pressure and reputational risk for commercial partners working with a sanctioned state, including non-sanctioned areas, and the possibility of unknowingly breaching sanction provisions—exposing commercial partners to administrative and judicial enforcement actions in the United States—dissuades commercial partners from engaging in business transactions, whether or not they are permitted, due to the potential triggering of default events and acceleration clauses with their commercial counterparties.<sup>112</sup>

*b. The Insurance Industry: the EU Example*

Another major chain in transactions, necessary for completing any trading operation and modes of transportation of goods, is insurance. Insurance coverage, either for the cargo, the vessel or the ports, is required for a seller to ship goods to the buyer. Without insurance, a commercial transaction will not be completed. The European insurance industry provides most of the insurance coverage for the world’s maritime transportation. To some extent, the European Union and, in particular, the United Kingdom,

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<sup>109</sup> Exec. Order No. 13,622, *supra* note 100, § 4 (imposing sanctions on the ISA sanctions menu including barring banks from the U.S. financial system, for certain activities including purchase of oil, other petroleum, or petrochemical products from Iran).

<sup>110</sup> See *US Withdrawal From the JCPOA: Total’s Position Related to the South Pars 11 Project in Iran*, TOTAL (May 16, 2018), <https://www.total.com/en/media/news/press-releases/us-withdrawal-jcpoa-totals-position-related-south-pars-11-project-iran> (in addition to U.S. financing, Total mentioned the loss of its U.S. shareholders, which represent more than 30% of its shareholding, and its inability to continue its U.S. operations as other reason for halting its business relations in Iran).

<sup>111</sup> *Id.*

<sup>112</sup> Dick Ziggers, *Iran Having Trouble Financing Grain Imports*, ALL ABOUT FEED (Jan. 30, 2012), <https://allaboutfeed.net/Process-Management/Management/2012/1/iran-having-trouble-financing-grain-imports-AAF012736W/> (explaining major European banks, including Rabobank, have ceased financing grade and other agricultural trades bound for Iran).

enjoy the same leverage over the insurance industry as the United States has over the international banking system.

This level of influence exerted by the European Union allowed their domestic measures to enjoy a significant extraterritorial effect, going so far as to affect the trade of foodstuffs and medicine.<sup>113</sup> The EU ban on the (re)insurance of tankers carrying Iranian crude oil was an effective measure on the Iranian economy.<sup>114</sup> European protection and indemnity insurers (“P&Is”)<sup>115</sup> were unable to provide related services, thus leaving Iranian vessels without insurance coverage.<sup>116</sup>

Restrictive measures on insurance and transportation not only significantly increase the cost of transactions,<sup>117</sup> they also cause considerable delays (up to four times more than usual) in the importation of goods into the sanctioned state, assuming the commercial operators are able to complete their transactions at all.<sup>118</sup>

##### 5. *The Economy of the Sanctioned State: Macroeconomic Consequences*

Another element affecting the efficacy of sanction programs concerns the sanctioned state’s macroeconomic structure and its degree of economic interdependence. The fact that the sanctioned state depends on outside sources for financial aid or food is key in assessing the humanitarian impact of economic sanctions. For example, the U.S. decision to deny credit

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<sup>113</sup> Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.) (holding Canada’s expectation on the possibility of keeping Iran as a customer of its agricultural products in 2010 was that “while agricultural exports are specifically excluded from the sanctions, indirect measures placing restrictions on Iranian vessels and on financing can adversely affect the volume of the trade”).

<sup>114</sup> See Clare Baldwin & Osamu Tsukimori, *Marine Insurance: The Stranglehold on Iran?*, REUTERS (Apr. 17, 2012, 2:11 AM), <http://uk.reuters.com/article/2012/04/17/uk-iran-oil-insurance-idUKLNE83G00G20120417>.

<sup>115</sup> See *Protection and Indemnity Insurance*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Protection\\_and\\_indemnity\\_insurance](http://en.wikipedia.org/wiki/Protection_and_indemnity_insurance) (last visited on Feb. 25, 2020) (P&I insurance is a form of marine insurance provided by a P&I club, a mutual (i.e., co-operative) insurance association that provides cover for its members, who will typically be ship-owners, ship-operators, or demise charterers).

<sup>116</sup> Iran Offers to Insure Foreign Ships to Skirt EU Ban, REUTERS (Jul. 17, 2012), <https://www.reuters.com/article/us-iran-shipping/iran-offers-to-insure-foreign-ships-to-skirt-eu-ban-idUSBRE86G0XX20120717>.

<sup>117</sup> By reportedly more than forty percent. See PAAIA, REPORT ON IRAN SANCTIONS 18 (August 2012), <http://www.paaia.org/CMS/Data/Sites/1/PDFs/Iran%20Sanctions%20Report%202012.pdf>.

<sup>118</sup> “Iran Shipbuilding Boycott Lifted” Does Not Solve Shipping Problem, BBC NEWS (Sept. 19, 2013), [http://www.bbc.co.uk/persian/business/2013/09/130919\\_101\\_shipping\\_lines\\_eu\\_sanctions.shtml](http://www.bbc.co.uk/persian/business/2013/09/130919_101_shipping_lines_eu_sanctions.shtml).

facilities to Poland that would have allowed it to buy U.S. corn had a considerable short-term impact on the Polish civilian population, due to Poland's dependence on this external source for food.<sup>119</sup>

The most devastating effects of sanctions stem from the macroeconomic consequences of economic sanctions on the target country. The impacts depend on the structure and the level of resilience of each economy. Macroeconomic repercussions of sanctions generally include high inflation, lowered purchasing power, and a reduction in access to essential goods.<sup>120</sup> High inflation and the unavailability of external finance following the imposition of sanctions caused Sudan's annual gross domestic product to decline.<sup>121</sup> Malnourishment among children increased from five percent to twenty-three percent in Haiti following sanctions.<sup>122</sup> The decline in economic activities,<sup>123</sup> the inefficient allocation and utilization of resources, the unequal distribution of facilities and budget cuts in the health sector,<sup>124</sup> result in the spread of diseases, some of which become untreatable due to lack of access to clean water, sufficient food, and life-saving medicine.<sup>125</sup> As an example, economic sanctions against Burma caused thousands of layoffs, including 100,000 women working in the textile industry and forced many unemployed women to engage in prostitution.<sup>126</sup>

The role of foreign trade in the economy of a sanctioned state and the diversity of its income-generating exports of goods and services also play a major role in the level of impact sanctions will have. Targeting income-generating sectors of an economy limits the financial capacity of a sanctioned state to continue its routine trade. This limitation, if it hits mono-

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<sup>119</sup> HUFBAUER ET AL., *supra* note 3, at 201.

<sup>120</sup> Ioana Petrescu, *The Humanitarian Impact of Economic Sanctions*, 10 EUROPOLITY 205, 205–06 (2016).

<sup>121</sup> SUZAN ADAM MOHAMMED HAMID, *THE RAMIFICATIONS OF ECONOMIC SANCTIONS ON HEALTH SERVICE SYSTEM: A COMPARATIVE STUDY OF SUDAN HEALTH SERVICE SYSTEM BEFORE AND AFTER ECONOMIC SANCTIONS* 35 (2012).

<sup>122</sup> Richard Garfield, *The Silently, Deadly Remedy*, 14 F. APPLIED RES. & PUB. POL'Y 52, 55 (1999).

<sup>123</sup> U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. & UNICEF, *Economic Sanctions, Health, and Welfare in the Federal Republic of Yugoslavia 1990–2000*, 28 (May 25, 2001) (“In 1991, prior to sanctions, trade averaged US \$800 million per month. In 1994 it had declined to a low of US \$200 million per month.”).

<sup>124</sup> Garfield, Devin, & Fausey, *supra* note 28, at 465.

<sup>125</sup> HAMID, *supra* note 121, at 2.

<sup>126</sup> Donald M. Seekins, *Burma and U.S. Sanctions: Punishing an Authoritarian Regime*, 45 ASIAN SURV. 437, 442 (2005).

product economies, becomes particularly potent. Countries whose economies are almost exclusively based on the exportation of a limited number of commodities are the most vulnerable to sanctions. The economic sanctions against Iran were crippling once they began targeting the purchase of Iranian crude oil and oil products.

The National Defense Authorization Act (“NDAA”), enacted in 2012 and entered into force on January 23, 2012 by EU Council Decision,<sup>127</sup> prohibited the “import, purchase or transport of Iranian crude oil and petroleum products”<sup>128</sup> and the “financing or financial assistance, including financial derivatives, as well as insurance and reinsurance” related to these activities.<sup>129</sup> This led to a sharp drop in Iranian crude oil exports, as much as a third of usual exports.<sup>130</sup> This amounted to a loss of \$133 million per day and an annual loss of \$48 billion, or approximately ten percent of the Iranian economy.<sup>131</sup> The European Union’s decision to designate the Central Bank of Iran (“CBI”) as a sanctioned entity alongside identical U.S. measures,<sup>132</sup> led to an international freeze at several financial institutions on the funds and assets of the CBI, which act as the main recipient of the proceeds of the sale of Iranian crude oil.<sup>133</sup> The sanction measure against CBI, which also acts as financial facilitator for the trade of food and medicine in Iran,<sup>134</sup> had a significant impact on the CBI’s operations and Iranians’ access to essential medicines.<sup>135</sup>

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<sup>127</sup> Council Decision 2012/35/CFSP of 23 Jan. 2012 O.J. (L 19) 22 (EC).

<sup>128</sup> *Id.* at 23, art. 1(2)1.

<sup>129</sup> *Id.* at 23, art. 1(2)2.

<sup>130</sup> Rick Gladstone, *Iranian Oil Minister Concedes Sanctions Have Hurt Exports*, N.Y. TIMES (Jan. 7, 2013), <https://www.nytimes.com/2013/01/08/world/middleeast/irans-oil-exports-and-sales-down-40-percent-official-admits.html>.

<sup>131</sup> See Anthony DiPaola & Isaac Arnsdorf, *Iran Loses \$133 Million a Day on Embargo, Buoying Obama*, BLOOMBERG (Aug. 2, 2012, 9:04 AM), <http://www.bloomberg.com/news/2012-08-01/iran-loses-133-million-a-day-from-sanctions-as-oil-buoys-obama.html>.

<sup>132</sup> Exec. Order No. 13,622, *supra* note 100, § 5.

<sup>133</sup> Matt Pearce, *Where Are Iran’s Billions in Frozen Assets, and How Soon Will It Get Them Back?*, L.A. TIMES (Jan 20, 2016, 3:00 AM), <https://www.latimes.com/world/middleeast/la-fg-iran-frozen-assets-20160120-story.html>.

<sup>134</sup> Council Regulation 267/2012, 2012 O.J. (L 88) 1, 2 (EC) (due to the possible impact of these punitive measures, this Council Regulation provided that these restrictive measures “*should not prevent trade operations, including contracts relating to foodstuffs, healthcare, medical equipment or for humanitarian purposes in accordance with the provisions of this Regulation*”).

<sup>135</sup> Mehrnaz Kheirandish et al., *Impact of Economic Sanctions on Access to Noncommunicable Diseases Medicines in the Islamic Republic of Iran*, 24 E. MEDITERRANEAN HEALTH J. 42, 42 (2018).



## 6. *Other Elements*

The gravity of the wrongful act being sanctioned confers greater legitimacy on such economic countermeasures. The impact of the sanctions on the affected population are also determined by further, “softer” elements. Such elements include the influence of specific pressure groups altering the effectiveness of economic sanctions in their early phases;<sup>136</sup> the legal enforcement actions available within a sanction program, like the possibility of punishing any engagement, whether pursued knowingly or unknowingly by an entity, with sanctioned entities or activities;<sup>137</sup> the level of judicial review available for sanction-related decisions and regulations;<sup>138</sup> the use of more or less ambiguous legal terminology without any clear definitions or guidelines; and the provision of broad definitions increasing the scope of sanctions.<sup>139</sup>

Finally, the manner in which the sanction is enforced and the seriousness of the application of legal measures play an important role in the severity of the sanctions.<sup>140</sup> The sudden or gradual enforcement actions leading to a sanction,<sup>141</sup> the aggressive approach of the sanctioning state,<sup>142</sup>

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<sup>136</sup> For example, in the United States, the “Cuban lobby” with regards to sanctions against Cuba; the “Jewish lobby” with respect to sanctions on Libya, Iraq, and Iran; the “Armenian lobby” with respect to Azerbaijan; etc. See Thomas Ambrosio, *Legitimate Influence or Parochial Capture? Conclusions on Ethnic Identity Groups and the Formulation of U.S. Foreign Policy*, in *ETHNIC IDENTITY GROUPS AND U.S. FOREIGN POLICY* 206 (Thomas Ambrosio ed., 2002).

<sup>137</sup> Guymon, *supra* note 106, at 856 (noting that a person is subject to designation for engaging in activities that “pose a risk” of materially contributing to proliferation as opposed to making any actual contribution).

<sup>138</sup> See 5 U.S.C. § 706(2)(A) (2018) (designating the statutory standard of review limits the courts’ determination to whether a decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152, 158 (D.C. Cir. 2004) (holding the court is not permitted “to make any judgment whatsoever regarding whether the material before the Secretary is or is not true,” but is allowed to inquire “whether the Secretary had enough information before [him] to come to the conclusion”) (internal quotations omitted); *Paradissiotis v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999).

<sup>139</sup> See, e.g., 22 U.S.C. § 8701 (2018) (incorporating the definition of “United States person” from 22 U.S.C. § 8511 (2018) and lowering the EAR de minimis threshold for sanctioned countries, such as Cuba and Iran, from 25% to 10% U.S.-origin content, thus changing the definition of U.S. goods, for which U.S. control laws apply extraterritorially); see also *Restricting Additional Exports and Reexports to Cuba*, 84 Fed. Reg. 56,117 (Oct. 21, 2019) (to be codified at 15 C.F.R. pts. 734, 740, and 746), <https://www.federalregister.gov/documents/2019/10/21/2019-22876/restricting-additional-exports-and-reexports-to-cuba>.

<sup>140</sup> SMART SANCTIONS, *supra* note 79, at 10.

<sup>141</sup> Walde, *supra* note 1, at 187.

the employment of non-legal measures, such as political and media pressure, and the way sanctions are portrayed in domestic politics of the target country<sup>143</sup> also affect the efficacy of economic sanctions.

*B. The Human Rights Obligations of the Sanctioning State*

Sanctions are aimed at reducing trade flows, denying investment, and limiting foreign exchange and credit facilities to the country. Therefore, sanctions affect access to humanitarian goods because they have a negative impact on the macroeconomic indexes of the target economy, dropping the value of the sanctioned state's currency, depleting the state's foreign exchange reserves, causing liquidity shortages due to the inconvertibility or non-transferability of its income, and limiting access to funds needed for purchasing humanitarian goods.<sup>144</sup> The negative macroeconomic impact along with the traders' unwillingness to engage in trade with the sanctioned state due to reputational damage and difficulties in securing a method of payment and obtaining letters of credit, even for humanitarian goods,<sup>145</sup> makes ring-fencing the trade of humanitarian goods from the general impact of sanction programs impossible.

The sanctioning state's efforts to convince other states to adopt similar restrictive measures against the sanctioned state and a state's monopoly in at least one of the components necessary for the formation of business transactions push foreign companies to refrain from permissible business of the target country. In addition, existence of factors such as the ambivalence of the sanction regulations, and political and media pressure can exacerbate the level of caution the international companies adopt in dealing with a sanctioned country. Restricted access to banking services and difficulties in

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<sup>142</sup> For example, the U.S. announced in 2018 that it had adopted a maximum pressure policy and that harming Iran was the "actual[] intended consequence[]" of the sanctions regime. *Background Briefing on President Trump's Decision to Withdraw From the JCPOA*, U.S. DEP'T OF ST. (May 8, 2018), <https://www.state.gov/background-briefing-on-president-trumps-decision-to-withdraw-from-the-jcpoa/>.

<sup>143</sup> SELECT COMMITTEE ON ECONOMIC AFFAIRS, *supra* note 16, ¶ 7.

<sup>144</sup> For example, following U.S. sanctions against Iran on oil sales, billions of dollars of payments for the purchase of Iranian oil were held up in South Korea and India due to the countries' inability to complete funds transfers to Iran. See Cho Mee-young & Yoo Choonsik, *Exclusive: Sanctions Trap Billions of Iran Petrodollars in Korea*, REUTERS (Aug. 31, 2011, 3:58 AM), <https://www.reuters.com/article/us-iran-korea/exclusive-sanctions-trap-billions-of-iran-petrodollars-in-korea-idUSTRE77228Q20110803>.

<sup>145</sup> See Nigel Hunt & Michael Hogan, *Exclusive: EU Banks Halt Iran Grain Trade Finance*, REUTERS (Jan. 26, 2012, 10:05 PM), <https://www.dailystar.com.lb/Business/Middle-East/2012/Jan-26/161189-eu-banks-halt-iran-grain-trade-finance-traders.ashx>.

securing insurance policies increase the associated risks and the cost of transactions. This consequently decreases overall trade volumes. As such, the general impact of sanctions on the whole economy makes it impossible to isolate the effects of comprehensive economic countermeasures on the access to food and medicine,<sup>146</sup> leading to a generalized shortage of essential medicine and medical equipment.<sup>147</sup>

### 1. *Human Rights Impact Assessment*

The increase in the impact of sanction programs causes a higher level of care and duty for the sanctioning state to limit negative effects and to ensure that fundamental human rights, such as access to food and medicine, are protected. In this respect, the CESCR sets out obligations for states and organizations “responsible for the imposition, maintenance or implementation of the sanctions,” to fully take into account the social and economic rights provided for in the ICESCR when designing sanction programs. The Committee is of the view that the key provisions of the UN Charter dealing with human rights (Articles 1, 55, and 56) fully apply when imposing sanctions:<sup>148</sup> “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights.”<sup>149</sup>

The Human Rights Council presents a more structured approach to this obligation by stating that an effective “human rights impact assessment,”<sup>150</sup> with the purpose of identifying, examining, and measuring the effects of sanctions on human rights “should become a non-derogable standard in cases of sanctions imposed by groups of States or regional organizations.”<sup>151</sup> This impact assessment, which can be conducted not only by the sanctioning states, but also by NGOs and international organizations,<sup>152</sup> should be conducted *ex ante* before sanction regimes are applied, with the “aim to measure the potential future effects of such

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<sup>146</sup> Garfield, Devin, & Fausey, *supra* note 28, at 465.

<sup>147</sup> *See, e.g., id.* at 458.

<sup>148</sup> *General Comment No. 8, supra* note 46, ¶ 1.

<sup>149</sup> *Id.* ¶ 1.

<sup>150</sup> Jazairy, *Unilateral Economic Sanctions, supra* note 37, at 296.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

measures on human rights” and possibly “adjust or change the sanctions regime with a view to preventing human rights violations.”<sup>153</sup>

## 2. *Monitoring and Responding to Suffering*

The humanitarian impact assessment of sanction measures should not be limited to the phase when sanctions are designed and introduced. The Council proposes that the impact assessment continue *ex post* by measuring “the actual impact of implemented sanctions through comparisons between the current situation and the situation before the measures were adopted.”<sup>154</sup> The *ex post* assessment shall include the materialized human rights risks, unforeseen effects, affected stakeholders, and the mitigating measures that could be adopted to reduce negative effects.<sup>155</sup>

The CESCR also highlights proposals such as establishing “a United Nations mechanism for anticipating and tracking sanctions impacts” and “[creating] a better resourced set of sanctions committees”<sup>156</sup> to better monitor the humanitarian impact of economic sanctions on the civilian population of the sanctioned state. After monitoring for negative effects, the sanctioning state would be required “to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.”<sup>157</sup>

## V. IRAN SANCTIONS: NEW DEVELOPMENTS IN THE ICJ’S RULING

On May 8, 2018, U.S. President Donald Trump withdrew from the Iran 5+1 nuclear deal (the “JCPOA”) by issuing a National Security Presidential Memorandum (“NSPM”). Following the implementation of the JCPOA, endorsed by UN Security Council Resolution 2231 on July 20, 2015, the UN, U.S., and EU sanctions against Iran, which were targeting almost the entire economy of Iran, were lifted. The significance of Iran’s nuclear activities to Western countries and Iran’s resistance to their sanctions mobilized the entire economic and political clout of the sanctioning states,

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<sup>153</sup> *Id.* at 296–97.

<sup>154</sup> *Id.* at 297.

<sup>155</sup> See *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, NORDIC TR. FUND & THE WORLD BANK 30 (Feb. 2013), <http://documents.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf>.

<sup>156</sup> *General Comment No. 8*, *supra* note 46, ¶ 12.

<sup>157</sup> *Id.* ¶ 14.

who ended up enacting what some view<sup>158</sup> as some of the most punitive economic sanctions ever, with some of the most complex and severe sets of restrictive measures adopted by U.S. Department of Treasury.<sup>159</sup>

The U.S. withdrawal from the JCPOA led to the reinstatement of U.S. sanctions against Iran, including the U.S. Presidential Executive Orders and the main congressional acts, such as the Iran Sanctions Act, the Iran Threat Reduction and Syria Human Rights Act, the National Defense Authorization Act, and the Iran Freedom and Counter-Proliferation Act.<sup>160</sup> Accordingly, the United States' comprehensive and secondary sanctions were unilaterally imposed. Two ninety- and one-hundred-eighty-day wind-down periods were considered for non-U.S. companies to terminate their activities and exit Iran.<sup>161</sup> The sudden decrease, by seventy percent, of the value of the Iranian currency<sup>162</sup> following the imposition of U.S. sanctions against Iran in May 2018, and the end of banking relations between Iranian and non-Iranian banks<sup>163</sup> affected the importation and prices of imported medicines and goods used for the production of medicines in Iran.

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<sup>158</sup> Patrick Goodenough, *Obama Touts Toughest Iran Sanctions in History, But Report Questions Their Effectiveness*, CNSNEWS (Oct. 23, 2012, 4:35 AM), <http://cnsnews.com/news/article/obama-touts-toughest-iran-sanctions-history-report-questions-their-effectiveness>; *Biden Touts Iran Sanctions as Ryan Voices Doubts*, YAHOO! NEWS (Oct. 11, 2012), <http://news.yahoo.com/biden-touts-iran-sanctions-ryan-voices-doubts-013524142--election.html>.

<sup>159</sup> JUAN C. ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 315 (2013).

<sup>160</sup> *Memorandum on Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, WHITEHOUSE (May 8, 2018), <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>.

<sup>161</sup> *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, U.S. DEP'T OF TREASURY 1 (May 8, 2018), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_winddown\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf).

<sup>162</sup> Mohammad Nasiri, *Iranians Say US Sanctions Blocking Access to Needed Medicine*, A.P. NEWS (July 30, 2019), <https://www.apnews.com/23327f44786845dbbece530664ee5a6>.

<sup>163</sup> See Esfandiyar Batmanghelidj, *Ambiguity in Trump Sanctions Could Put Humanitarian Trade with Iran at Risk*, BOURSE & BAZAAR (May 14, 2018), <https://www.bourseandbazaar.com/articles/2018/5/10/deadly-ambiguity-in-trump-sanctions-move-risks-all-humanitarian-trade-with-iran> (“Interruptions in banking channels saw payments turn from the use of industry-standard letters of credit and deferred payment terms to cash-in-advance payments using exchange houses. Transaction and operational costs skyrocketed, with costs being passed on to the consumer, whose buying power was eroded by currency devaluation.”).

The re-imposition of U.S. comprehensive secondary sanctions on Iran and the humanitarian impact of these measures led Iran to initiate judicial proceedings before the International Court of Justice against the United States on July 18, 2018, based on the violation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.<sup>164</sup> Iran further submitted a Request for the Indication of Provisional Measures.<sup>165</sup> In its Request, Iran asked the court to order that the United States “immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the sanctions from May 8, including the extraterritorial sanctions.”<sup>166</sup>

The United States argued that the U.S. sanctions targeting the Iranian economy provided for broad authorizations and exceptions<sup>167</sup> “for conducting or facilitating a transaction for the provision (including any sale) of agricultural commodities, food, medicine or medical devices to Iran.”<sup>168</sup> However, Iran claimed that despite these carve-outs and exemptions, the applicable measures made the importation of urgently needed supplies impossible and “deeply affected the delivery and availability” of life-saving medicines and medical equipment to the Iranian people.<sup>169</sup>

Iran, in its claim arguing for the detrimental impact of U.S. sanctions on Iranian civilians, referred to certain elements in the U.S. sanctions that could amplify their impact. Iran referred to statements made by U.S. authorities expressing their “[determination] to cause even greater prejudice”<sup>170</sup> against Iran, tighten the screws on Iran,<sup>171</sup> and about the U.S.

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<sup>164</sup> Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. U.S.), Application Instituting Proceedings, 2018 I.C.J. 175 (July 16).

<sup>165</sup> Iranian Provisional Measures, *supra* note 12, ¶ 77 (explaining the request for provisional measures was submitted pursuant to Article 41 of the Statute and to Articles 73, 74, and 75 of the Rules of International Court of Justice. The Court’s power to indicate provisional measures exist when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings, or when the alleged disregard of such rights may entail irreparable consequences and if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision).

<sup>166</sup> *Id.* ¶ 14.

<sup>167</sup> *Clarifying Guidance on Humanitarian Assistance and Related Exports to the Iranian People*, TREASURY DEP’T OFFICE OF FOREIGN ASSETS CONTROL (Feb. 6, 2013), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hum\\_exp\\_iran.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/hum_exp_iran.pdf).

<sup>168</sup> Exec. Order No. 13,645, *supra* note 108, § 2(e).

<sup>169</sup> Iranian Provisional Measures, *supra* note 12, ¶ 81.

<sup>170</sup> *Id.* ¶ 80.

<sup>171</sup> *Id.* ¶ 82.

administration's maximum pressure policy and the announcement of further sanctions and their chilling effects.<sup>172</sup> These were important facts in establishing a real and imminent risk that would cause irreparable prejudice. This matter highlights the importance of the sanctioning state's approach when increasing the impact of its sanctions.<sup>173</sup> Additionally, Iran referred to the extraterritorial element to show how the impact of U.S. sanctions exacerbated their chilling effect on many foreign companies and nationals, who announced "their withdrawal from activities in Iran, including the termination of their contractual relations with Iranian companies and nationals."<sup>174</sup>

On October 3, 2018, the ICJ issued an interim order establishing an important step in the role of human rights obligations when designing and imposing economic sanctions.<sup>175</sup> Although the court order was instituted mainly in accordance with the 1955 Treaty of Amity, it marks a new development with regard to the duty of the sanctioning state vis-à-vis the fundamental human rights of the sanctioned state's civilian population.

#### A. *Importance of the Impact*

The ICJ first reminded the parties of the importance of human rights obligations. The "importation and purchase of goods required for humanitarian needs" was discussed as a necessary element that cannot be superseded, even by measures "necessary to protect . . . essential security interests" of the sanctioning states.<sup>176</sup> Further, the court, instead of reviewing the domestic sanction measure of the sanctioning state, focused on the impact of the sanction measures and deemed that a sanctioning state's mere textual exemption and expression of best endeavor is insufficient for claiming fulfillment of its duty of care. These elements "are not adequate to address fully the humanitarian and safety concerns raised by the Applicant."<sup>177</sup>

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<sup>172</sup> *Id.* ¶ 72.

<sup>173</sup> Jazairy, *Unilateral Economic Sanctions*, *supra* note 37, at 296.

<sup>174</sup> Iranian Provisional Measures, *supra* note 12, ¶ 83.

<sup>175</sup> *Id.*

<sup>176</sup> Iranian Provisional Measures, *supra* note 12, ¶ 68.

<sup>177</sup> *Id.* ¶ 92.

The court's findings regarding the existence of an "Imminent Risk," "Irreparable Impact,"<sup>178</sup> and "Irreparable Prejudice," to assess whether the requirements for an interim order were satisfied, went a step further from focusing only on the domestic sanctions measure. The court considered the "irreparable consequences" the sanctions may have on the population of the sanctioned state, without being merely satisfied with "rights relating to the importation and purchase of goods required for humanitarian needs."<sup>179</sup> In addition, the court noted the restrictions on companies providing maintenance for Iranian aviation companies.<sup>180</sup> This provided an insight that the court may also take into account how the sanction measure spells out in practice.

The United States' claim that "there could be multiple causes to which the economic stagnation and difficulties in Iran can be attributed, including mismanagement by the Iranian Government" was ruled out by the court on the basis that it is difficult "to assess the specific impact of its measures on the Iranian economy."<sup>181</sup> In return, the court emphasized the objective outcome of the sanctions and observed that despite the fact that the importation of food, medical supplies, and equipment is exempted from the U.S. sanctions, "it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment."<sup>182</sup>

### *B. The Procedure for Granting Licenses*

The humanitarian exemptions have been mostly structured in a manner which require prior U.S. government approval for transactions and payments related to exempted supplies. The ambiguity, arbitrary nature, and inconsistent interpretations of these exemptions have caused delays, confusion, and, in some cases, denial of requests to export humanitarian goods.<sup>183</sup> The procedural difficulties in obtaining approvals for exempted

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<sup>178</sup> *Id.* ¶ 91 ("The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life . . .").

<sup>179</sup> *Id.* ¶ 90.

<sup>180</sup> *Id.* ¶ 88.

<sup>181</sup> *Id.* ¶ 85.

<sup>182</sup> *Id.* ¶ 89.

<sup>183</sup> *General Comment No. 8, supra* note 46, ¶ 5.



supplies and the fear of prosecution under sanctions enforcement actions impede the task of aid agencies<sup>184</sup> and have resulted in many international firms and entities refusing to sell humanitarian goods, thus significantly affecting the level of access to life-saving medicine and food.<sup>185</sup>

A major factor in making the humanitarian carve-outs more compatible with the effective protection of fundamental human rights has been monitoring the procedure for granting licenses. Establishing uniform criteria and definitions for these exemptions, as well as operational criteria for sanctions committees, is of the utmost importance.<sup>186</sup> CESCR, without endorsing any proposal, notes that proposals should have a “more transparent set of agreed principles and procedures based on respect for human rights,” “authorization of agreed technical agencies to determine necessary exemptions,” and the “introduction of greater overall flexibility.”<sup>187</sup>

The European Union’s restrictive measures against Iran provide a clear example of an increased observation for the trade of humanitarian goods. The measures set a more relaxed licensing procedure when increasing embargo measures. Initially, the EU Regulation of October 15, 2010,<sup>188</sup> included only limited, weak humanitarian exemptions.<sup>189</sup> However, the EU Council later moved towards toughening the embargo against Iran and adopted Council Regulation 267/2012, which was accompanied by the introduction of a new mechanism for granting authorizations to ease investment in “food, agricultural, medical, or other humanitarian purposes.”<sup>190</sup> The authorization regime for trade transactions was also eased, by lifting the “appropriate end-user guarantees” and removing Iran’s undertaking “not to use the goods or technology concerned . . . in

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<sup>184</sup> LARRY MINEAR ET AL., INST. FOR INT’L STUDIES, TOWARD MORE HUMAN AND EFFECTIVE SANCTIONS MANAGEMENT: ENHANCING THE CAPACITY OF THE UNITED NATIONS SYSTEM 58 (1998).

<sup>185</sup> See, e.g., Garfield, Devin, & Fausey, *supra* note 28, at 460 (serious delays occurred while foreign firms sought U.S. authorization for the sale of medicines to Cuba, and on several occasions the product was useless by the time it arrived).

<sup>186</sup> *Id.* at 467–68.

<sup>187</sup> *General Comment No. 8, supra* note 46, ¶ 12.

<sup>188</sup> Council Regulation 961/2010, 2010 O.J. (L 281) 1.

<sup>189</sup> See *id.* art. 7 (providing humanitarian exceptions, including “appropriate end-user guarantees”).

<sup>190</sup> Council Regulation 267/2012, art. 19, 2012 O.J. (L 88) 1, 9.

proliferation-sensitive nuclear activities or for development of nuclear weapon delivery systems.”<sup>191</sup>

The court’s order following Iran’s request provides guidance on how humanitarian carve-outs should be drafted and enforced to meet human rights requirements. In this context, the court found that merely providing an explicit textual humanitarian carve-out or “licensing policy providing for a case-by-case issuance of licenses”<sup>192</sup> does not meet the humanitarian obligation of the sanctioning state. Rather, “[t]he United States of America shall ensure that licenses and necessary authorizations are granted.”<sup>193</sup> The court’s ruling was a further step in defining sanctioning obligations as results-oriented rather than means-oriented.

One of the major elements when designing the humanitarian carve-out is identifying a wide range of exempted goods and services. Prohibitions on importing necessary medical equipment, such as incubators or catheters for babies,<sup>194</sup> or excluding certain pharmaceutical inputs from the humanitarian exemptions adversely affect the production of medicine in the sanctioned state.<sup>195</sup> The adverse impact of these deficiencies significantly increased the humanitarian impact of sanctions in countries such as Iraq,<sup>196</sup> Yugoslavia,<sup>197</sup> and Burundi.<sup>198</sup> To address this deficiency, the CESR’s General Comment 8 highlights the proposal of having a “wider range of exempt goods and services”<sup>199</sup> in order to make sanction programs more compatible with human rights obligations.

This element was not invoked by Iran in its Request, but it was referred to by the court indirectly in its enumeration of humanitarian goods and elaboration of further goods necessary for the safety of civil aviation. In

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<sup>191</sup> *Id.* art. 7.

<sup>192</sup> Iranian Provisional Measures, *supra* note 12, ¶ 86.

<sup>193</sup> *Id.* ¶ 102.

<sup>194</sup> HUFBAUER ET AL., *supra* note 3, at 603.

<sup>195</sup> Petrescu, *supra* note 120, at 210.

<sup>196</sup> Comm. on Econ., Soc. and Cultural Rights, Third Periodic Rep. on the Work of Its Seventeenth Session, E/C.12/1/Add.17, ¶ 7 (Dec. 12, 1997).

<sup>197</sup> See Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT’L L. 771, 784–86 (1993).

<sup>198</sup> Julia Grauvogel, *Regional Sanctions Against Burundi: A Powerful Campaign and its Unintended Consequences* 10 (German Inst. of Global & Area Studies Working Paper No. 225, 2014).

<sup>199</sup> *General Comment No. 8*, *supra* note 46, ¶ 12.

its interim ruling, the ICJ provided that the United States “shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation.”<sup>200</sup>

### C. *The Removal of Any Impediment and Banking Payment*

One of the main elements increasing the impact of sanction measures is the control of the sanctioning state over a necessary chain in a transaction. The United States’ leading role in financial markets and multinational companies’ dependence on access to banking payment services necessary for conducting humanitarian trade operations with Iran<sup>201</sup> have had a major extraterritorial impact on the importation of humanitarian goods to Iran.<sup>202</sup> The impact of banking sanctions, especially those blocking transactions, have not only impacted the flow of humanitarian goods but also prevented donations from foreign charities, including those approved by the U.S. Treasury.<sup>203</sup>

Due to these impediments and banking difficulties experienced under the previous Iran sanctions regime between 2010–2015, the Swiss government, following the introduction of U.S. sanctions on May 8, 2018, entered into discussions with the U.S. administration to establish a humanitarian channel with Iran.<sup>204</sup> The goal of the Swiss government was to seek “some sort of ‘certainty’ for banks involved [in humanitarian trade with Iran] so that they will not be excluded from the U.S. market” and clarity on the permissibility of “the transfer of Iranian-origin funds into the Swiss accounts” when Iranian importers pay Swiss importers for humanitarian

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<sup>200</sup> Iranian Provisional Measures, *supra* note 12, ¶ 98.

<sup>201</sup> Kenneth Katzman, *Iran Sanctions* 68–69 (Library of Congress Congressional Research Service, Paper RS20871, Jan. 24, 2020).

<sup>202</sup> Esfandiyar Batmanghelidj, *Ambiguity in Trump Sanctions Could Put Humanitarian Trade with Iran at Risk*, BOURSE & BAZAAR (May 14, 2018), <https://www.bourseandbazaar.com/articles/2018/5/10/deadly-ambiguity-in-trump-sanctions-move-risks-all-humanitarian-trade-with-iran>.

<sup>203</sup> Nasiri, *supra* note 162.

<sup>204</sup> Esfandiyar Batmanghelidj, *Trump’s NSC “Blocks” Swiss Effort to Ease Iran Humanitarian Trade*, BOURSE & BAZAAR (July 31, 2019), <https://www.bourseandbazaar.com/articles/2019/7/31/trumps-nsc-blocks-swiss-effort-to-ease-humanitarian-trade-with-iran>.

goods. Though these requests were consistent with existing U.S. sanctions laws, they were blocked by the U.S. administration in 2018.<sup>205</sup> In addition, the U.S. administration took a step further in designating Parsian Bank,<sup>206</sup> a major Iranian bank handling banking payment for humanitarian trade, as a Specially Designated Global Terrorist (“SDGT”).<sup>207</sup> This decision came as a big surprise to Iran’s humanitarian trade.

Iran’s request also stated that “sanctions” on the purchase or acquisition of U.S. dollar banknotes and on significant transactions related to the purchase or sale of Iranian rial plainly impose restrictions on the making of payments, remittances, and other transfers to or from Iran.”<sup>208</sup> The ICJ observed that “as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks.”<sup>209</sup> These foreign banks refused to accept banking transfers and ceased all corresponding relations.

The court found that “it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment.”<sup>210</sup> The court ruled that having “broad authorizations and exceptions to allow for humanitarian-related activity”<sup>211</sup> does not meet the

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<sup>205</sup> The Swiss Humanitarian Trade Arrangement (“SHTA”) finally opened in late January 2020 with the purpose of assuring export guarantees through Swiss financial institutions on shipments of food, pharmaceuticals, and medical products to Iran. Michael Shields & Humeyra Pamuk, *U.S. Says First Shipments of Medicine to Iran Delivered Via Swiss Humanitarian Channel*, REUTERS (Jan. 30, 2020), <https://www.reuters.com/article/us-swiss-iran/u-s-says-first-shipments-of-medicine-to-iran-delivered-via-swiss-humanitarian-channel-idUSKBN1ZT205>.

<sup>206</sup> *Treasury Sanctions Vast Financial Network Supporting Iranian Paramilitary Force That Recruits and Trains Child Soldiers*, U.S. DEP’T OF THE TREASURY (Oct. 16, 2018), <https://home.treasury.gov/news/press-releases/sm524>.

<sup>207</sup> Parsian Bank—along with three other Iranian banks: Pasargad Bank, Middle East Bank, and Saman Bank—is unusual among Iranian financial institutions because it complies with FATF-reflective standards on anti-money laundering procedures. For this reason, it was a major bank in handling sanction-compliant trade with Iran. Esfandyar Batmanghelidj, *New Sanctions on Iran’s Parsian Bank Threaten Humanitarian Trade*, BOURSE & BAZAAR (Oct. 16, 2018), <https://www.bourseandbazaar.com/articles/2018/10/16/new-sanctions-on-irans-parsian-bank-threaten-humanitarian-trade>.

<sup>208</sup> Iranian Provisional Measures, *supra* note 12, ¶ 57.

<sup>209</sup> *Id.* ¶ 89.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* ¶ 86.

minimum requirement for the protection of human rights. It ruled that the United States “shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran” of humanitarian goods.<sup>212</sup>

The ruling is a general obligation that could include any legal or administrative hurdle that might adversely affect trade of humanitarian goods. However, in this respect, the court singled out one of the most important elements in the formation of trading transactions: banking payments. Indeed, as seen previously, the United States has major leverage over international trading systems through its control of banking payments. Finally, the court ruled that the United States should ensure “that payments and other transfers of funds are not subject to any restriction” insofar as they “relate to humanitarian goods and services.”<sup>213</sup>

## VI. CONCLUSION

Economic sanctions are the most prevalent policy tools for decisionmakers in international relations. They have been widely used by the powerful and economically advanced states to enhance their foreign policy. The global economic structure and complicated nature of international trade relations have created a complex picture of countermeasures in the human rights context. The general regression of social and economic rights, the impact of economic sanctions on the trade of humanitarian goods due to negative macroeconomic effects, and the significant increase in transaction costs have made the merely textual legal carve-outs in sanctions an insufficient policy for addressing these humanitarian consequences.

In this context, a sanctioning state, while not required to provide direct humanitarian assistance to the sanctioned country, cannot be released from its liability if it only limits its actions to the mere inclusion of textual waivers for humanitarian goods in its sanction programs. The lack of clear procedures for such carve-outs and their related payments, the fining of major international financial institutions for facilitating payments related to sanctioned economies, the approach of the sanctioning state in exerting

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<sup>212</sup> *Id.* ¶ 98.

<sup>213</sup> *Id.* ¶ 102(2).

maximum pressure on the sanctioned state, the structure of the sanctioned economy, and the comprehensive nature and extraterritorial implementation of domestic laws all play a role in enhancing the power of a sanction program, and consequently affect the importation of humanitarian goods to the sanctioned country.

The Order of the ICJ pursuant to the Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (*Islamic Republic of Iran v. United States of America*) case established a legal precedent in designing and structuring economic sanctions and humanitarian carve-outs. Although the court bound its jurisdiction on the Treaty of Amity, its decision concerning the irreparable damages of the reinstatement of U.S. secondary sanctions on May 8, 2018 provides an insight into how a sanction regime must be designed to be more compatible with human rights obligations.

The Court ruling provided that a licensing policy, based on a “case-by-case” issuance of licenses, does not meet the humanitarian obligation of the sanctioning state. The sanctioning state must, therefore, ensure that licenses and necessary authorizations are “effectively granted.” In addition, the court ruled for the insufficiency of the broad authorizations and waivers regime and required that any impediment arising from sanction measures to the free exportation of humanitarian goods to the sanctioned state must be removed by the sanctioning state. To this end, the court, due to the United States’ domination of the international financial system, highlights the issues encountered by legitimate financial institutions with banking transfers. The sanctioning state must ensure that the banking transfers related to humanitarian goods and services are not subject to any restriction.

The more sanction regimes increase in strength and scope, the higher the level of obligation of the sanctioning state in seeking the “protection of fundamental human rights,” especially in relation to the civilian population of the sanctioned state. This obligation goes beyond providing mere textual exceptions and authorizations in sanction laws and regulations and shall take into consideration the power of the sanctioning state and the effect of the restrictive measures on the population of the sanctioned state. Therefore, when it comes to U.S. economic sanctions, the United States, due to its greater authority in global financial system, shall ensure that the banking transfers related to humanitarian goods shall be made without any restriction.

